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CITY OF DALLAS

October 29, 1997

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: In the Matter of: Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement and Construction of Broadcast Station Transmission Facilities, MM Docket No. 97-182

Dear Sir or Madam:

Enclosed herewith please find an original and ten copies of the Comments of the City of Dallas, Texas and City of Cedar Hill, Texas in response to the Proposed Rulemaking in the above referenced matter. Please file stamp one copy.

Should you have any questions, I may be contacted at (214) 670-3478.

Sincerely,

Scott Carlson
Assistant City Attorney

Enclosure

No. of Copies rec'd 029

OFFICE OF THE CITY ATTORNEY CITY HALL DALLAS, TEXAS 75201 TELEPHONE 214/670-3510 FAX 214/670-3515

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Comments of the City of Dallas, Texas and Cedar Hill, Texas

In the Matter of:

Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement and Construction of Broadcast Station Transmission Facilities

MM 97- 182

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Before the
Federal Communications Commission
Washington, D. C. 20554

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Comments of the City of Dallas, Texas and Cedar Hill, Texas

The Federal Communications Commission ("FCC") has requested comments in the Matter of: Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement and Construction of Broadcast Station Transmission Facilities, MM Docket No. 97-182 ("NPRM") issued in connection with the preemption request and proposed rule of the National Association of Broadcasters and Association for Maximum Service Television ("NAB"). The proposed rule and rulemaking are premised upon the FCC goal of rapid and aggressive deployment of digital broadcasting.[1] NAB seeks a broad preemption and limitation of local zoning and land use, building code and other traditional local government authority with regard to digital broadcasting ("DTV") and other transmission facilities . In these comments, such authority will be referred to as either local zoning or land use authority. The Cities of Dallas, Texas and Cedar Hill, Texas (collectively referred to as "City") submit the following comments in response to the NPRM and the attached proposed rule.

[1] NPRM ¶11.

Prefatory Remarks

Several inherent incentives, independent of any action taken by the FCC in this rulemaking, will motivate local governments and local elected officials to expedite approval of tower siting requests. First, it is axiomatic that elected officials want to please their constituents and conversely avoid displeasing them. Assuming that the public truly desires DTV services, local government officials will desire the delivery of these services to their constituents as quickly as possible. Delay affords no benefit to local elected officials. In fact, a significant political downside exists in delay. Second, with the roll-out of digital television, spectrum will be returned. A portion of the returned spectrum will be designated for use by public safety entities.[2] Benefitted local governments, therefore, possess an inherent self-interest in the rapid approval of tower siting requests.

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[2] NPRM ¶10. See also, Notice of Proposed Rulemaking, ET Docket No. 97-157, FCC 97-245, Reallocations of Television Channels 60-69, the 746-806 MHz band (July 9, 1997). See also, Balanced Budget Act of 1997, Pub. L. 105-33, 111 Stat. 251, 267 (1997) (codified at 47 U.S.C. §337).

Summary

Towers pose a potential threat to life and property. The proposed rule fails to adequately deal with this threat. The rule, which presumes the invalidity of otherwise legitimate health and safety regulations and ignores any federal interest in the safety of life and property, puts individuals, their communities and property at risk. This outcome is ironic given the FCC statutory mandate to promote the safety of life and property through the use of wire and radio communications.

The Communications Act, as amended,[3] ("the Act" or "the statute") does not grant the FCC statutory authority to conduct this rulemaking. The Act never entrusts the reconciliation of the federal interest in DTV deployment and local zoning authority over the facilities of DTV.

The need for this preemption has not been demonstrated. NAB points to several instances of purportedly burdensome local government processes, but in only one instance is a DTV facility involved. According to reports, broadcast industry representatives indicate that the roll-out date will not be met for reasons other than the local zoning process. Conversion requires intensive capital input. Tower construction firms are scarce and in demand.

The rule runs afoul of a number of Constitutional prohibitions. The rule will have a chilling effect upon the ability of individuals to petition their local representatives. The time limits established in the rule cannot be met and still allow local citizens to voice their views to local elected officials. The rule violates the

[3] 47 U.S.C. §151 et seq.

Tenth Amendment by regulating states as states, using the local legislative process to further the federal regulatory scheme, dictating local zoning priorities and granting federal preferential rights.

The proposed rule, in its particulars, is woefully inadequate. It ignores proper and legitimate land use distinctions, discards aesthetics, creates risks to life and property through deemed approval and a balancing test, creates potential structural and other safety problems through the imposition of deadlines which cannot be met, and establishes the FCC as a national zoning board through proposed alternate dispute resolution.

I. The Proposed Rule Threatens the Safety of Life and Property

Towers pose physical dangers to life and property. Unless isolated and away from other land uses, a tower collapse threatens lives and property within the fall radius. Depending upon the location, towers are subject to and must address the vagaries of geological formations and land types where they are located and must survive earthquakes, ice, wind, and other natural phenomena which threaten to undermine their structural integrity or expose any material or workmanship defect. As evidenced by FAA involvement, towers also create an air navigation hazard. Besides the obvious danger to pilots, crews and passengers, aircraft/tower collisions threaten the lives and property of individuals miles away from the actual antenna locations.

The City's concerns are not merely speculative. Demonstrating these points, attached are:

1. photographs of a collapsed broadcasting tower in the Dallas area (Exhibit A); and

2. accounts of the Dallas area collapse from the Dallas Morning News and the account of a recent tower collapse in Mississippi from the Biloxi Sun Herald (Exhibit B).[4]

The pictures and articles graphically illustrate and describe the dangers posed by the collapse of broadcasting towers. Three workers were killed in each collapse. Fortunately, the towers were sited in areas designated for tower use and no other lives were lost or property damaged. Each collapse occurred while workers were installing a new antenna on the tower.[5]

Although not noted in these specific articles, aircraft/tower collisions have occurred in the Dallas area. A marine fighter struck a tower guy wire and crashed nearby. The tower was damaged and required repairs. Fortunately the pilots ejected safely. No property was damaged by the crashed aircraft. In a helicopter accident, the pilots were not as lucky; both pilots died.

Indirect effects to the public health and safety result from a tower collapse. According to the account of the Mississippi tower collapse, the broadcast system of County Sheriff's Department was no longer able to function. Apparently,

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[4] Berta Delgado TV tower Collapse still a mystery, DALLAS MORNING NEWS, November 12, 1996 at A17; Berta Delgado Cause of fatal TV tower collapse still a mystery DALLAS MORNING NEWS November 16, 1996 at 39A; Berta Delgado OSHA cites employer of 3 killed in tower collapse, DALLAS MORNING NEWS April 11, 1997 at 35A. Structure served many communities BILOXI SUN HERALD October 24, 1997 (downloaded from online publication).

[5] The NAB petition indicates that similar work - the installation of antennas on existing towers - will be required in the deployment of digital broadcasting.

communications with sheriff's deputies in the field were disrupted. In addition, emergency crews were hampered in attempts to reach the site because of downed power lines.

These above described events underscore the fact that accidents occur even with planning guidelines. Therefore, since accidents will always happen, often the best planning can accomplish is minimizing the harm.

Zoning, land use regulations and building codes are enacted for and dedicated to the public health, safety and welfare of local citizens.[6] By definition, these regulations encompass the protection of life and property.[7] Through the evisceration of this authority in the proposed rule, the proposed rule threatens the public health and safety. In the worst case - deemed approval - public health and safety are completely disregarded in the proposed rule. Public health and safety are, at best, subjugated in the proposed balancing test to a transcendent federal interest in the deployment of digital television. The threat is magnified by the unprecedented height anticipated for DTV towers.

The FCC has a statutory obligation to promote the safety of life and property through the use of radio and wire communications.[8] Indeed, this is one of the

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[6] The Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[7] Id.

[8] 47 U.S.C. § 151. "For the purpose of regulating interstate and foreign commerce in communication..., for the purpose of promoting safety of life and property through the use of wire and radio communication..." [Emphasis ours]

primary purposes of the Act. A correlative obligation to this statutory duty admonishes the FCC against imperiling life and property through the use of wire and radio communications. In light of this specific statutory duty to promote the safety of life and property, it is ironic for the FCC to adopt or even consider a proposed rule which gravely compromises or eliminates consideration of local zoning and building code regulations designed to limit risks to life and property. Compounding this irony, the proposed rule imperils the public health and safety in an effort to expedite the digital television roll-out, in part, so that a portion of the recaptured spectrum can be made available to public safety agencies.[9]

One might contend that local governments cannot complain about the peril to public health and safety in the instance of deemed approval, since these authorities had an opportunity to act and did not do so. We address the inadequacy of the proposed timelines later, but in reality, this response is no response at all. The answer does not ensure that the public health and safety are ultimately addressed. The fact remains that if the deadline is not met, public health and safety are disregarded.

The FCC does not indicate that it will investigate the installation and plans for siting and tower construction to ensure the public health and safety are addressed and maintained. While addressing the ability to preempt health and safety rules which may frustrate the rapid deployment of DTV, the NPRM fails to mention any federal interest in the protection of life and property except under local

[9] NPRM ¶10.

law.[10] The City notes the characterization of federal interests and non-federal interests.[11] No federal interest per se exists for the protection of public health and safety under the proposed rule. No specific recognition of the role of local zoning authority and building codes in the protection of life and property is found in the NPRM.[12] In short, the protection of public health and safety takes a subservient role to the goal of ensuring that the accelerated deployment of DTV is not hindered through the exercise of local zoning and land use controls.[13]

Fundamental health and safety protections cannot be sacrificed on the altar of expedited roll-out. With the absence of the FCC assurance to protect public health and safety, deemed approval and subjugation of the public health and safety in the balancing test, the proposed rule imperils the safety of life and property. Deemed approval within an impossible time span does not safeguard the public health and safety. The balancing test, although ostensibly including public health and safety concerns as one competing factor, does not provide protection either. If the federal interest in the balancing test are the stated interests in the proposed rule, then the

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[10] Id., see also NPRM ¶14.

[11] NPRM ¶15. The FCC does not necessarily wish to infringe the rights of local governments to protect the legitimate interests of their citizens.

[12] NPRM ¶12.The FCC does discuss the interests of local governments in the health and safety and its authority to preempt such regulations to accomplish the objectives of Congress or act within its delegated authority.

[13] NPRM ¶13. See also NPRM ¶13, footnote 20 citing 47 U.S.C. §151, "the rapid efficient Nation-wide and world-wide radio communication service with adequate facilities .."

presumption of invalidity can never be satisfactorily rebutted. As the FCC notes in its NPRM, the FCC will preempt when health and safety rules stand as an obstacle to federal interest. With no federal interest in public health and safety, in its effect, the balancing test is really another deemed approval with the same disregard for the public health and safety.

II. The FCC Lacks the Statutory Authority to Conduct this Rulemaking.

A. The Act Does Not Entrust Reconciliation of Local Zoning and other Traditional Authority and the Accelerated Roll-out of Digital Broadcasting to the FCC

The FCC cites City of New York v. F.C.C. in support of assertion of jurisdiction, contending it has the authority to achieve a fair accommodation of competing policies.[14] In reality, though, the FCC is statutorily entitled to reconcile competing policies entrusted by the statute to the agency for reconciliation.[15] The statute never entrusts reconciliation of the "competing policies" of local land use authority and the proposed schedule for DTV.

In New York, the Court considered competing provisions over technical standards related to cable television. Two statutory provisions, one authorizing action by the local franchising authority and the other by the FCC, were at issue. The Court agreed with the FCC resolution of these competing provisions and policies.

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[14] NPRM ¶12, footnote 19. New York v. F.C.C., 486 U.S. 57 (1988).

[15] Id. at 64. "... the Court has cautioned that even in the area of pre-emption, if the agency's choice to pre-empt "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." "

New York actually provides little authority to justify this rulemaking and compels the conclusion that the FCC has no jurisdiction to act. Unlike New York, this rulemaking relies upon no competing provisions. No statutory provision expressly authorizes the FCC to engage in this rulemaking. No provision limits or evidences an intent to limit local zoning and other authority over DTV or other transmission facilities.

The FCC cites Sections 154(i), 303, and 336 of the Act as authority for this rulemaking.[16] None of those sections specifically call for the preemption of local zoning authority over digital and other broadcast facilities. The rulemaking authority found Sections 307 and 336 are related solely to licensing. Section 336, in particular, is directed to digital broadcasting. The regulations authorized in 336(a) and 336(b) are linked to the issuance of additional licenses for digital television. The regulatory instructions in Section 336(c) call for regulations related to the surrender of a license. Section 303 anticipates regulations in furtherance of the Title III statutory provision. As related to digital broadcasting, those provisions are found in Section 336 which as discussed are directed to licensing. If Congress had intended that the FCC rely upon Section 154(i) authority, it would not have bothered to include the preemptive rulemaking instructions found elsewhere in the Act. Section 253, Section 332(c)(3) and others would not be necessary.

Congress has quite clearly expressed its preemptive intent and granted specific authority to the FCC. In Section 253, with some notable exceptions, Congress gave

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16 NPRM Appendix A. 47 U.S.C. §§154(i), 303, 307 and 336.

the FCC preemptive authority over state and local government regulations which prohibited or had the effect of prohibiting telecommunications services.[17] No comparable provision exists authorizing preemption of local zoning authority for the purposes of expediting DTV.[18]

When Congress did intend FCC preemption of local land use authority, it said so directly. In Section 207 of the Telecommunications Act of 1996 ("the Telecom Act"), Congress directed the FCC to "preempt state and local regulations which impair reception of over-the air devices."[19] No corresponding provision was included in the Telecom Act or the recently enacted Balanced Budget Act for the preemption of local land use regulations in furtherance of DTV.

In Louisiana Public Service Commission v. F.C.C., the Court addressed the extent and foundation of FCC rulemaking authority.[20] The Court stated:

> "While it is certainly true, and a basic underpinning of our federal system, that state regulation will be displaced to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and

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17 47 U.S.C. §253(a). The authority to preempt does not extend to the traditional authority of local governments to manage the local rights of way and seek compensation for the use of the right of way. (47 U.S.C. §253(c)). The authority to manage the right of way is analogous to and in one sense a subset of the authority to control land use in general.

18 The City does not understand this rulemaking to be about prohibition or effectively prohibiting DTV. Rather, this rulemaking is about expediting the roll-out of digital television.

19 P.L. 104-104, 110 Stat. 114 (Feb. 8, 1996).

20 476 U.S. 355 (1986).

> objectives of Congress [cite omitted], it is also true that a federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority. This is true for at least two reasons. First, an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it. Second, the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency."[21]

When applied to this rulemaking, the principles set forth by the Louisiana Court dictate that the FCC is without statutory authority to preempt local zoning and land use regulations. As previously discussed, the Act is devoid of express preemptive instructions to preempt with respect to the accelerated DTV deployment. When the nature and scope of FCC authority is examined against the Court's New York discussion and the general deferential standard afforded state and local laws by the courts, preemptive authority is not present.

Generally, when considering whether a federal statute preempts state and local authority, the courts require a "clear and manifest intention' on the part of Congress, to justify a finding of preemption of state and local traditional police powers.[22] A presumption operates that Congress does not intend to displace state

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[21] Id. at 374.

[22] "Where ... the field which Congress is said to have preempted" includes areas that have "been traditionally occupied by the States, congressional intent to supersede must be " 'clear and manifest' " Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

law.[23] In areas of traditional local control, the courts will not lightly infer preemption.[24] No such clear and manifest intention is present in statutory authority underlying the proposed rulemaking.

In reaching its conclusion, the New York Court noted that the FCC had taken regulatory action with respect to cable television for many years and that Congress in enacting the conflicting provision acted within the backdrop of these prior regulatory practices. Unlike New York, Congress was not legislating in the Telecom Act against the backdrop of continued FCC preemption over broadcasting facilities. The FCC does not regulate local land use authority over broadcasting facilities. In reality, Congress was legislating against a totally different backdrop - local control over the land use decisions of broadcasting facilities. [25]

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[23] Parker v. Brown, 317 U.S. 341 (1943). "In a dual system of government in which under the Constitution the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to modify a state's control over its officers and agents is not to be lightly attributed to Congress." Id. at 351.

[24] Gregory v. Ashcroft, 501 U.S. 452 (1991). "Where the intent to override is doubtful, our federal system demands deference to long established traditions of state regulation." BFP v. Resolution Trust Corp., 511 U.S. --, 128 L.Ed.2d, 556, 570, 114 S.Ct. 1757, 1766 (1994).

[25] "Absent a clear statutory requirement to the contrary, we must assume the validity of this state-law regulatory background and take due account of its effect. 'The existence and force and function of established institutions of local government are always in the consciousness of lawmakers and, while their weight may vary, they may never be completely overlooked in the task of interpretation.' " BFP at 128 L.Ed.2d at 565, 114 S.Ct. at 1762, citing Davies Warehouse Co. v. Bowles, 321 U.S. 144, 154 (1944).

B. Lack of a Congressional Prohibition Does not Empower the Agency to Act

The FCC cannot overcome or justify the lack of statutory authorization through a finding that because Congress did not specifically prohibit the action, the FCC is empowered to act. In American Petroleum Institute v. Environmental Protection Agency,[26] the D. C. Circuit struck down such a rationale. EPA attempted to issue regulations based upon general rulemaking authority even though a specific statutory limited its actions. The court stated:

> "[ ], we will not presume a delegation of power based solely on the fact that there is not an express withholding of such power. " [27]

Similarly, the FCC is not empowered to act simply because Congress did not expressly prohibit preemption. Congress indicated the scope of FCC preemptive authority over state and local land use regulations in the Act. The authority urged by NAB is not statutorily present. This absence does not empower the FCC but limits it.

III. The FCC Should Not Preempt When the Broadcasting Industry Has Not Diligently Pursued Build Out and Reports Indicate Logistical Difficulties, Besides Local Zoning Authority, in Meeting the Proposed Deadline

The FCC points out that thousands of towers have been installed across the country.[28] As the FCC notes, local zoning authority has not proved an "insuperable"

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[26] 52 F.3d 1113 (D. C. Cir. 1995).

[27] Id. at 1120.

[28] NPRM ¶16.

obstacle in the construction of these towers.[29] Based upon this history of zoning approval of tower construction and placement through the entire country, the City questions whether the concerns regarding the effect of local zoning authority on digital broadcasting and other transmission facilities is truly warranted and preemptive action by the FCC is justified.

A. Broadcasters and Tower Industry Representatives Indicate the Schedule Will Not be Met

According to a front page, headline story in the Wall Street Journal and the NAB petition, other causes, besides local zoning authority, will delay the build-out of digital television.[30] Broadcasters state that a decade is required "before anything is real."[31] Capital costs are enormous. Uncertainty over the desire of consumers for digital television exists. In light of this uncertainty, broadcasters are reluctant to invest the necessary capital.

Both the NAB petition and the Wall Street Journal note the scarcity of tower crews. Without tower crews, obviously, towers cannot be built.

In addition, review by FAA will take some time to ensure that the proposed towers do not pose a hazard to air navigation. It is certainly possible that FAA review will take as long or longer than the ordinary zoning approval process.

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[29] Id.

[30] Kyle Pope and Mark Robichaux, Hype Definition Waiting for HDTV Don't Go Dumping Your Old Set Just Yet, WALL ST. J., September 12, 1997 at A1. Copy attached as Exhibit C.

[31] Id. at A10.

B. Preemptive Action Is Not Warranted

NAB cites a solitary instance where local governments have allegedly engaged in an overly burdensome process related to DTV.[32] A much stronger showing is necessary to warrant FCC action. The lack of specific instances could indicate that local governments have had little opportunity to delay the process or that the installation of an antenna on an existing tower is a matter of right. In either event, preemptive action is not warranted. Conversely, if one local zoning authority presented such an obstacle, one would expect a more substantial record.

Anecdotal evidence demonstrates that local governments have had no or little opportunity to even minimally impact the deployment of DTV facilities. In late September, at a meeting attended by local government representatives of the ten largest television markets, only one market representative was aware of a formal application for the construction of a DTV facility. That city, not coincidentally, is the only case cited by NAB related to DTV deployment. Talks are apparently underway in a number of other top ten television markets, but according to these representatives, in those cases no formal application has been submitted.

The FCC must compile a record which warrants preemptive action. In summary, application of local zoning authority has not been demonstrated to be a hindrance to expedited roll-out. The roll-out is projected to be delayed by factors independent of local zoning approval process. If roll-out is delayed, as the industry

32 The other instances cited by NAB have no relationship at all to efforts to achieve DTV scheduled deployment. The City questions therefore how such instances, assuming the description is accurate, form the foundation for this action.

representatives state, the NAB brief intimates and tower industry representatives stipulate, time exists to pursue the normal approval process for towers.

IV. The Proposed Rule Contravenes the Constitution

A. The Proposed Rule Threatens to Eliminate the Fundamental Individual Right to Petition the Government

Citizens possess the fundamental right to petition their government.[33] The right is implicit in "[t]he very idea of government, republican in form."[34] The proposed rule does not ensure that this fundamental right is protected. First, the proposed rule does not affirmatively address and authorize public comment. Second, in its workings, the proposed rule, through deemed approval in 21, 30 or 45 days, curtails this fundamental right.

State statutes mandate a public hearing process in connection with zoning matters. These public hearings must comply with certain notifications and associated time periods before the public hearing can take place. As a practical matter, the first public hearing does not occur until after city staff has reviewed and made recommendations about the application. The length of time necessary for this review depends upon the complexity of the proposal.

Under Texas law and the City of Dallas Development Code, two hearings

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[33] U.S. Const. Amend. I; Texas Const. Article 1 §27.

[34] United States v. Cruikshank, 92 U.S. 542, 552.

must be held.[35] The first hearing is before the City Plan Commission, with ten days advance notice to surrounding property owners. The second hearing is before the City Council with fifteen days advance notice. The applicant or the opponents may request that either of these hearings be postponed for up to sixty days.[36] In the City of Dallas, the City Council regularly meets to approve zoning issues every other week. City Council and the City Plan Commission do not meet simultaneously. In other words, actions taken by the Plan Commission will not be considered the next day by the City Council. Several weeks may pass between Plan Commission action and Council consideration.

The timeline set forth in the proposed rule undermines any meaningful opportunity for public input. The process, as described, cannot be completed within the 45 day outside time limit, much less the 21 or 30 deadlines. The City of Dallas must comply with Texas law for public hearings (mandatory for a political subdivision of the State), but in complying with state law, the proposed rule would have the application deemed approved before completion of the process. The citizen is denied an opportunity to present his concerns to his or her local elected officials and will be held accountable by the voters.

One possible response is that local citizens retain the right to petition the FCC with regard to deemed approval of tower siting. Such a position is flawed from two

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35 Tx. Local Government Code §211.006 and §211.007. Dallas Development Code §51A-4.701.

36 Dallas Development Code §51A-4.701(e).

fundamental standpoints. First, the FCC itself has indicated that it does not want to become a national zoning board. The rule certainly does not contemplate citizen input to the FCC. Second, local citizens do not elect the FCC or even elected federal officials to determine and resolve local zoning concerns. Local officials are elected with the expectation that they will consider and determine these issues.

B. The Proposed Rule Violates the Tenth Amendment and Federalism Principles

In violation of federalism and the principles embodied within the Tenth Amendment, the FCC impermissibly attempts to regulate states as states and state regulation of interstate commerce (assuming that local land use regulations represent a regulation of interstate commerce, which the City does not admit) in furthering the federal regulatory scheme of accelerated digital television roll-out.[37] The rule is specifically directed at how local governments control land use and provide for local safety and building requirements and directs local governments and local government officials to act in accordance with federal instructions.

The proposed rule does not preempt, but instead manipulates the local land use regulatory process. Land use regulation is a quintessential function of local governments. The local governing body is acting in a legislative capacity.[38] Local

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37 "The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state government regulations of interstate commerce. State of New York v. U.S., 505 U.S. 144, 166 (1992).

38 "Zoning is a legislative function entitled to great deference. Wood Marine Service v. City of Harahan, 858 F.2d 1061 (5th Cir. 1988).

government officials are elected and take office with the expectation that they will provide local land use regulation. The rule, therefore, impermissibly directs local government officials in their official capacities.[39] In the deemed approval process, the local government is locked into participating in the federal regulatory process. Paraphrasing the State of New York Court, no matter what a local government does, it must follow the path of the FCC.[40]

In its effect, the proposed rule is similar to the federal statute struck down by the Court in State of New York. The State of New York could either take title to hazardous waste or regulate hazardous waste according to the instructions of Congress. The Court determined that Congress had presented the State of New York with an unconstitutional choice. Similarly, the FCC presents local government officials with untenable choices in the roll-out of digital television. The officials can theoretically choose to act within the time constraints or, as discussed, not meet state and constitutional requirements for public hearings. This is no choice at all because state and local governments, as political subdivisions of the state, must comply with state law.

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39 Such coercion was invalidated by the Court where laws are directed specifically at the local government officials in their official capacities. "We have held, however, that state legislatures are not subject to federal direction. Printz v. U.S., 65 USLW 4731, 117 S.Ct. 2365, 2373 (1997). In Printz, the Court invalidated a federal statute which forced local officials, in their official capacities, to implement a federal regulatory scheme.

40 "The State may not decline to administer the federal program. No matter which path the State chooses, it must follow the directions of Congress." Id. at 177.

The proposed rule masks the political accountability of the federal government for the siting and construction of these towers and for the elimination of applicable building codes. Political accountability is a key factor in testing the validity of federal action which affects local governments.[41] Deemed approval counterfeits the normal process. Although it appears so, the local government has not approved the tower land use. Assuming a rule is ultimately adopted, the FCC must make clear to local citizens that its actions are responsible for the siting and construction of broadcast towers. Elected federal officials, whether the President or members of Congress, as opposed to local elected officials, will then theoretically bear the credit and assume the blame for the FCC action.

The proposed rule goes farther than regulation of states. With the rigid and impossible timelines, a federal preferential right is created and foisted upon local governments. Other legitimate matters which are also of local concern and interest may be shunted to one side due to this timeline and indeed, under the proposed timetable must be set aside, if local governments have any hope of meeting the overly ambitious deadlines set out in the proposed rule.

V. Specific Comments on Proposed Rule

The following comments on the proposed rule are offered to provide a full response to the NPRM. The comments in no way express support in any form for the proposed rule or a belief that the FCC possesses authority to issue the rule or should issue a rule.

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[41] State of New York at 168 (1992).